

In the Matter of George Ayad, City of Jersey City
DOP Docket No. 2005-5207
(Merit System Board, decided November 22, 2005)

George Ayad requests reconsideration of the attached final decision of the Merit System Board (Board), rendered on June 22, 2005, which determined that he failed to present a *prima facie* case of reprisal.

By way of background, the petitioner alleged that Leonard Greiner, Jr., an Assistant Director of Licenses, and Maynard Woodson, then an Assistant Administrative Analyst, created an extremely hostile work environment for him in response to the petitioner's report to the New Jersey Attorney General's Office that Greiner and Woodson placed ineligible taxicabs into service in violation of Jersey City Municipal Code 307-20(H). For example, the petitioner indicated that Woodson "verbally intimidated" him and Greiner retaliated against him by writing a memorandum dated December 15, 2004 with allegations against him. Additionally, the petitioner asserted that he supplied evidence showing that Woodson abused his authority regarding an incident occurring on October 23, 2004 at the Journal Square taxi stand. The Board noted that the petitioner did not submit the December 15, 2004 memorandum and other documents he mentioned in his prior petition. The petitioner took a medical leave of absence on October 21, 2004 and contended that he could not report to his office because he was being subjected to harassment and retaliatory behavior.

On February 2, 2005, the petitioner returned to work. However, he encountered issues with respect to available workspace and believed that the appointing authority had no intention of giving him back his position based on his lack of a workstation. Moreover, on February 14, 2005, the appointing authority advised the petitioner that before returning to work, he needed a doctor's note from his personal physician and from the City's physician. The petitioner did not return to work on February 15, 2005, blaming his absence on the appointing authority. In response, the appointing authority granted the petitioner an extended medical leave to March 30, 2005. Additionally, the petitioner was advised that during his leave, the petitioner would be covered under the City's major medical insurance. However, the petitioner's prescription, dental, and life insurance would terminate effective February 28, 2005 and if the petitioner wished to continue that coverage, he would be required to pay for it out of his own funds. The petitioner claimed that this was another example of the appointing authority's retaliation. The petitioner submitted a note from Dr. Devendra Kurani, a personal psychiatrist, dated April 27, 2005, stating that the petitioner was under her care for treatment of depression and he was advised to refrain from work until June 29, 2005. It is noted that the petitioner has not yet returned to work.

The Board reviewed the petitioner's allegations and found that he did not meet the elements of a *prima facie* case of reprisal under *N.J.A.C.* 4A:2-5.1(a) and *N.J.S.A.* 11A:2-24. See e.g., *Katherine Bergmann v. Warren County Prosecutor*, Docket No. A-5665-01T5 (App. Div. Dec. 1, 2004). Specifically, the Board determined that the activities of the petitioner were protected and that he "reasonably believed" that the information he conveyed indicated a violation of the municipal ordinance concerning the placement of taxicabs into service. Moreover, the Board found that the petitioner's "complaints" were made to an "appropriate recipient" of the information. However, the Board determined that apart from his unsubstantiated claims of retaliation by Greiner and Woodson, the petitioner did not demonstrate that he suffered any unlawful employment action. The petitioner was not disciplined and the appointing authority provided a legitimate explanation as to the circumstances surrounding his return to work. Regarding the petitioner's benefits, the Board stated that it could not be reasonably inferred that the action taken against the petitioner was motivated by his complaints, given the undisputed fact that he had been absent for an extended period of time. Thus, the Board determined that he failed to prove "a connection, or nexus, between the disclosure and the complained of action."

In his request for reconsideration, the petitioner submits a copy of a memorandum dated November 24, 2004 from Greiner to Jack Beirne, the Municipal Department Head for the Department of Housing, Economic Development and Commerce (HEDC), regarding the overall responsibility of the Division of Commerce and a reorganization plan. In the memorandum, Greiner stated that the petitioner's status should remain the "same" or he should be "transfer[red]" to another division and substitute with a License Inspector. He is unhappy working in this division." Additionally, the petitioner submits a copy of the December 15, 2004 memorandum, which was addressed to Paul Mackey, former Assistant Corporation Counsel, and authored by Greiner. In the memorandum, Greiner stated that in a letter dated November 18, 2004, the petitioner's former attorney, Samuel J. Halpern, Esq., indicated that he hoped to meet with Greiner and other appointing authority representatives to resolve the petitioner's employment status through a transfer or other means. Greiner stated that he was not aware if discussions were still underway, but he recommended that the petitioner's transfer be considered as it would be in the best interest of the division. Further, he noted that the petitioner did not receive a salary increase based on his "job performance, reliability, and attendance." Prior to the petitioner taking a leave of absence, the petitioner had been absent for 19 days and late approximately 50 percent of the time. The petitioner argues that the memoranda "illustrate and suggest an intense interest by Mr. Greiner as to the events surrounding my return to work. Mr. Greiner also demonstrates a strong reluctance for me to be working in the Division of Commerce . . . The [appointing authority] reaffirmed that sentiment upon my return to work on February 2, 2005 by not allowing me to be reinstated." Moreover, he notes that

Greiner indicated that he was unhappy in the Division of Commerce without giving any details.

As to Woodson, the petitioner submits a memorandum dated October 26, 2004 that he wrote to Robert Cotter, the former Municipal Head for HEDC, concerning the October 23, 2004 incident at the Journal Square Taxi Stand. The petitioner advised Cotter that Woodson performed an unauthorized inspection on a taxicab. He wanted to know why Woodson, the Acting Secretary of the Alcohol Beverage Commission, performed such an inspection when complaints regarding taxicab matters were supposed to be directed to the petitioner. The petitioner requests that the Board reconsider his petition based on the information provided.

In response, the appointing authority, represented by Anthony DeSalvo, Assistant Corporation Counsel, maintains that the documentation presented by the petitioner adds nothing to what was considered by the Board, as it was already presented by reference in the original proceeding. Further, it contends that if anything, the submissions solidify the position that no action of reprisal was taken by the appointing authority against the petitioner. Moreover, the appointing authority submits a copy of a complaint that the petitioner filed on July 6, 2005 with the Superior Court of New Jersey. The petitioner filed the complaint under the Conscientious Employee Protection Act (CEPA), *N.J.S.A. 34:19-1, et seq.*, alleging that due to his revelation of violations of Jersey City Municipal Code 307-20, he has been harassed and treated with hostility, which compelled him to take a medical leave of absence, in violation of CEPA. As such, the appointing authority argues that the petitioner has waived his administrative rights and must pursue his claim through the CEPA complaint.

In response, the petitioner contends that he has not waived his administrative rights by virtue of his CEPA complaint since his allegations of reprisal were filed with the Board prior to his CEPA complaint. Thus, he maintains that his allegations are independent of his CEPA complaint. Further, the petitioner argues that in his case, there is a clear violation of the law, rules, and regulations. Therefore, he asserts that administrative remedies are available to him.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Board may reconsider a prior decision. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

In the instant matter, it appears that the memoranda the petitioner submits would not change the outcome of his case, since they fail to demonstrate that the

petitioner suffered any unlawful employment action. Nevertheless, it is unnecessary for the Board to review whether to reconsider its prior decision. In this regard, once a CEPA claim is instituted, parallel claims under State law are deemed waived. See *Young v. Schering Corporation*, 141 N.J. 16 (1995); *Scouler v. City of Camden*, 332 N.J. Super. 69 (App. Div. June 15, 2000). Specifically, N.J.S.A. 34:19-8 provides that:

Nothing in this act shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or State law or regulation or under any collective bargaining agreement or employment contract; **except that the institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law.** (Emphasis added)

On July 6, 2005, the petitioner filed a complaint with the Superior Court of New Jersey, alleging that due to his revelation of violations of Jersey City Municipal Code 307-20, he has been harassed and treated with hostility, which compelled him to take a medical leave of absence, in violation of CEPA. The petitioner complained to the Board of similar actions of reprisal in the prior proceeding. The petitioner's request for reconsideration also rests solely on the same claims which he has presented to the Superior Court of New Jersey under CEPA. Therefore, based on the waiver provision of CEPA, the petitioner no longer has a right to challenge the appointing authority's alleged actions in this forum and his request for reconsideration is deemed waived. Accordingly, the Board dismisses the petitioner's request for reconsideration.

ORDER

Therefore, it is ordered that this request for reconsideration be dismissed.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

In the Matter of George Ayad, City of Jersey City
DOP Docket No. 2005-3121
(Merit System Board, decided June 22, 2005)

George Ayad, an Administrative Analyst with the Division of Commerce, Department of Housing, Economic Development and Commerce, City of Jersey City, petitions the Merit System Board for relief, pursuant to *N.J.S.A. 11A:2-24* and *N.J.A.C. 4A:2-5.1, et seq.*, from alleged reprisal by his employer.

The petitioner states that on January 12, 2004, he reported to the New Jersey Attorney General's Office violations of Jersey City Municipal Code 307-20(H), which pertain to the removal from service of taxicabs which are over 60 months old. He alleges that Leonard Greiner, Jr., an Assistant Director of Licenses, and Maynard Woodson, then an Assistant Administrative Analyst, were violating the ordinance by placing ineligible taxicabs into service. Since reporting such violations, the petitioner alleges that Greiner and Woodson have created an extremely hostile work environment. For example, Woodson "verbally intimidated" the petitioner and Greiner retaliated against him by writing a memorandum dated December 15, 2004 with allegations against him. It is noted that the petitioner does not submit this memorandum or explain the specific contents therein. Moreover, the petitioner asserts that he has a history of reporting improprieties and wrongdoing on the part of Greiner and Woodson. For example, in 1999, the petitioner reported to the Director of Commerce that inspectors were taking bribes. As a result of a police investigation, the accused inspector entered a pre-trial intervention program and Greiner was arrested. The petitioner notes that Greiner was later reinstated to his position and has filed a lawsuit against the appointing authority. He claims that Greiner blames him for the arrest. However, the petitioner explained to Greiner that he did not mention Greiner's name or implicate him in any way. Moreover, the petitioner asserts that he supplied evidence showing that Woodson abused his authority regarding an incident occurring on October 23, 2004 at the Journal Square taxi stand. He also claims that Woodson has intimidated other employees and as a result, the employees abruptly left the Division of Commerce.¹

Further, the petitioner reports that he was on a leave of absence for personal reasons from April 20, 2004 to June 21, 2004. He returned to work, but took a medical leave of absence on October 21, 2004. The petitioner contends that he could not report to his office because he was being subjected to harassment and retaliatory behavior. However, the petitioner states that the appointing authority

¹ It is noted that the petitioner refers to documents that he states have been attached to his correspondence relating to the incidents in questions. However, the petitioner did not submit copies of this information.

has made several attempts to resolve the matter. Paul Mackey, a former Assistant Corporation Counsel, advised the petitioner's attorney, Samuel Halpern, Esq.,² that the petitioner's salary would be increased \$7,500 if he were willing to sign a release which would prevent him from pursuing the matter. However, the petitioner states that he declined the offer since the appointing authority has caused him a great deal of stress and an enormous amount of financial hardship. The petitioner made a counter offer requesting that he be compensated for "lost wages" and given a salary of \$42,000 instead of the \$30,000 he currently makes. However, Mackey could only offer the petitioner a \$7,500 increase. The petitioner reiterates that he declined the offer and told Mackey that he just wanted his job back with no increase. Thereafter, the petitioner states that he and Halpern had several discussions regarding the terms of his return to work. It was determined by Joann Monahan, an Assistant Corporation Counsel, and Halpern that the petitioner's return to work would be on February 2, 2005.

The petitioner explains that he returned to work on February 2, 2005 only to be advised by Brian Kelly, the new Director of the Division of Commerce, that he did not receive any documentation concerning the petitioner's return to work. He only received a voice message from Monahan that the petitioner would return to work. The petitioner was also advised by Kelly that he did not have a desk or available space for the petitioner to work. The petitioner went to the Mayor's office and spoke with Carl Czaplicki, the Chief of Staff, who informed him to speak to John Beirne, the Municipal Department Head for the Department of Housing, Economic Development and Commerce. Beirne told the petitioner to report to the Building Department. However, the petitioner stated that the City offered him a position there, but he declined and he was to return to the Division of Commerce. Beirne supposedly stated that Greiner advised that the petitioner was not to return to the Division of Commerce. The petitioner replied that he did not care what Greiner said and that he would return to the Division of Commerce. The petitioner notes that Greiner is about to retire. On February 3, 2005, the petitioner returned to the Division of Commerce and he was provided with a desk. However, the petitioner complained that he still had no telephone or computer. Kelly advised the petitioner that since he was just promoted to Director of the Division of Commerce, many changes were occurring and he assured the petitioner that he would eventually receive a proper workstation. On February 4, 2005, the petitioner states that he attempted to perform his duties despite not having a computer. As he was working, he discovered that the Division of Commerce was still engaging in violations of Jersey City Municipal Code 307-20(H) by replacing taxicab number 35 with an ineligible vehicle. The petitioner states that he photocopied the relevant documents and placed them into his briefcase which he left in his car during lunch. He went back to his car at 5:00 p.m. and discovered that his car window had been broken and briefcase stolen. He filed a report with the Jersey City Police Department and informed Kelly that his briefcase was stolen.

² The petitioner is not represented by counsel in the within matter.

On February 9, 2005, Kelly advised the petitioner that he could have Kelly's old workstation and perform his previous clerical duties. The petitioner notes that this is inappropriate since his title of Administrative Analyst is considered a management position and not a clerical one. Further, the petitioner states that on February 10, 2005, Kelly advised him that he could no longer have Kelly's old workstation because of "technical difficulties." Kelly told him that the office was being held for the incoming Secretary of the Alcohol Beverage Commission. However, the petitioner states that Woodson is the Acting Secretary and it appears that a replacement will not be made in the near future. The petitioner also indicates that at 2:00 p.m. that day, he saw Greiner at the office. He asserts that it would seem that regardless of his pending retirement, Greiner still "has some influence over the events in the office."

On February 14, 2005, Kelly told the petitioner to see Larry Ross, Director of Human Resources. Ross advised the petitioner that before returning to work, the petitioner needed a doctor's note from his personal physician and from the City's physician. The petitioner replied that he already provided a note from his personal physician. The petitioner then spoke with Monahan who advised that the procedure was just a formality required by the personnel office. On February 15, 2005, the petitioner was absent from work, blaming his absence on the appointing authority.

The petitioner has not yet returned to work and claims he has been forced to take an extended medical leave due to the hostile work environment. On February 23, 2005, Monahan advised Halpern that the petitioner's request for an extended medical leave to March 30, 2005 had been approved. Additionally, she advised that during his leave, the petitioner would be covered under the City's major medical insurance. However, the petitioner's prescription, dental, and life insurance would terminate effective February 28, 2005. Monahan indicated that if the petitioner wished to continue that coverage, he would be required to pay for it out of his own funds. The petitioner submits that this is another example of the appointing authority's retaliation: terminating benefits without an explanation. Moreover, the petitioner contends that he has not yet been paid for the days he worked from February 2, 2005 through February 14, 2005.

In summary, the petitioner maintains that the appointing authority has not done anything to resolve the matter. He contends that Greiner has ousted him from his position at work in the attempt to suppress the lawful disclosure of information regarding Greiner and Woodson's violation of Jersey City Municipal Code 307-20(H). Additionally, the petitioner believes that the appointing authority has no intention of giving him back his position as evidenced by the lack of a workstation. The petitioner requests that the Board intervene in this matter and order that the retaliation against him cease.

Initially, the appointing authority, represented by Anthony J. DeSalvo, Assistant Corporation Counsel, responds that the petitioner has not been disciplined, demoted, or terminated. It explains that the petitioner was on a personal leave of absence and was granted two medical leaves of absence. However, it states that Monahan was not aware that the petitioner was on a medical leave of absence prior to his return to work in February 2005. Thus, she did not provide him with any information regarding the procedures required for him to return, *i.e.*, appropriate medical clearance from the petitioner's doctor and the City's doctor. The petitioner was later advised to obtain such information. However, to date, the appointing authority has not received the requested documentation. Moreover, the appointing authority verifies that the petitioner's absence from February 15 to February 18, 2005 was recorded as sick leave. It submits that the petitioner will be paid for the days he is entitled. Upon the petitioner's return to work with the appropriate medical documentation, the appointing authority states that he will be returned to his former position. It is noted that the appointing authority does not address the petitioner's specific allegations of reprisal.

In response, the petitioner submits a note from Dr. Devendra Kurani, a personal psychiatrist, dated April 27, 2005, stating that the petitioner is under her care for treatment of depression and he is advised to refrain from work until June 29, 2005.

CONCLUSION

N.J.A.C. 4A:2-5.1(a) generally provides that an appointing authority shall not take or threaten to take any reprisal action against an employee in the career, senior executive or unclassified service in retaliation for an employee's lawful disclosure of information on the violation of any law or rule, governmental mismanagement or abuse of authority. *See also N.J.S.A.* 11A:2-24. In *Katherine Bergmann v. Warren County Prosecutor*, Docket No. A-5665-01T5 (App. Div. Dec. 1, 2004), the New Jersey Superior Court, Appellate Division, upheld the Board's determination that the petitioner in that case failed to present a *prima facie* case of reprisal under *N.J.S.A.* 11A:2-24. In order to obtain relief under *N.J.S.A.* 11A:2-24, the Board indicated that an employee is required to prove the following elements:

- 1) The employee "reasonably believed" in the integrity of the disclosure at the time it was made, meaning the employee had no reasonable basis to question the substantive truth or accuracy of the content of the disclosure just prior to communication (it is here that the term "reasonable belief" is borrowed from the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1, *et seq.*, to define what is the substantive content of a "lawful disclosure");

- 2) The employee disclosed the information to a source “reasonably” deemed an appropriate recipient of such information just prior to communication (here, the term “reasonably” is used to describe the perceived proper channels through which a “lawful disclosure” should be communicated);
- 3) There is a connection, or nexus, between the disclosure and the complained of action (this is a standard cause-and-effect showing by the employee). *Carlino v. Gloucester City High School*, 57 F. Supp. 2d 1, 35 (D.N.J. 1999); *Kolb v. Burns*, 320 N.J. Super. 467, 476 (App. Div. 1999).

Only after the employee satisfies the criteria above does the appointing authority bear the burden of showing that the action taken was not retaliatory. *See Wright Line*, 251 NLRB 1083 (1980); *Mount Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

Using the test as enumerated above, the Board finds that the activities of the petitioner in this case were protected. The petitioner met the first prong of the test in that he “reasonably believed” that the information he conveyed indicated a violation of the municipal ordinance concerning the placement of taxicabs into service. The Board also finds that the petitioner met the second prong of the test for reprisal in that his “complaints” were made to an “appropriate recipient” of the information. Moreover, it is noted that the appointing authority does not dispute that the petitioner met the first two prongs of the above-enumerated test.

However, it is clear that the petitioner has failed to satisfy the third prong of the test. Apart from his unsubstantiated claims of retaliation by Greiner and Woodson, the petitioner has not demonstrated that he suffered any unlawful employment action. The appointing authority advises that the petitioner has not been disciplined and provides a legitimate explanation as to the circumstances surrounding his return to work. The petitioner reacted to what appears to have been a miscommunication and lack of exchange of information regarding his return to work. Moreover, the appointing authority advises that the petitioner will be returned to his former position once he returns from medical leave. Further, the petitioner asserts that terminating several of his benefits without explanation was as an example of retaliation. However, it cannot be reasonably inferred that the action taken against the petitioner was motivated by his complaints, given the undisputed fact that he has been absent for an extended period of time which affects his entitlement to certain benefits. Thus, based on the foregoing, the petitioner has failed to prove “a connection, or nexus, between the disclosure and the complained of action.” Accordingly, the petitioner has failed to present a *prima facie* case of reprisal.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.